Supreme Court, U.S.
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No. 01-1670

IN THE
Supreme Court of the United States

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,
Petitioner.

v.

ROBERT NAST,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In this Federal Employers' Liability Act ("FELA") case brought by an injured railroad worker and tried in a Pennsylvania state trial court, did the Pennsylvania Superior Court Panel correctly uphold the Trial Court's discretionary ruling excluding from evidence, on state law evidentiary grounds of irrelevance, tax returns from a separately incorporated Subchapter S corporation owned by plaintiff, which Petitioner offered as relevant to the issue of mitigation of damages, where:

(i) plaintiff did not claim that his income from his fireworks business had declined as a result of his personal injuries,

(ii) the Trial Court admitted other expert testimony and evidence on the issue of plaintiff's mitigation of damages,

(iii) the Trial Court permitted cross-examination of plaintiff on his income from and activity with respect to his independent fireworks business,

(iv) the Trial Court conditioned its ruling on the plaintiff's not offering any testimony that there was "a loss of business income in the second business,"

(v) the Trial Court specifically charged the jury, without objection by Petitioner, "that an injured party is under a legal obligation to mitigate damages, that is to minimize economic loss resulting in his injury by resuming gainful employment as soon as that can be reasonably done," and

(vi) the Trial Court thus specifically placed before the jury the issue of an FELA plaintiff's duty to mitigate, consistent with the uncontradicted, uniform holdings of at least six federal circuits with respect to that issue?

2. Does this Court have jurisdiction under 28 U.S.C. § 1257(a) to review the judgment of an intermediate state appellate court in a Federal Employers' Liability Act suit where the judgment is predicated on the independent and adequate state law evidentiary ground of the lack of relevance of certain proffered evidence that was excluded at trial and where the Petition seeks to induce review based only on a casual remark of the appellate court with respect to a possible alternative ground for that ruling?

3. Does this Court have jurisdiction under 28 U.S.C. § 1257(a) to review the judgment of an intermediate state appellate court where the question presented to this Court by Petitioner was never raised or decided by the state courts below?

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COUNTER-STATEMENT OF THE CASE

On April 7, 1997, Respondent Robert Nast ("Nast"), a machinist employed by Petitioner New Jersey Transit Rail Operations ("Petitioner"), sustained injuries when he fell in exiting a train while working in Petitioner's Raritan Rail Yard. As a result of his injuries, Mr. Nast was unable thereafter to perform his duties as a machinist for Petitioner. 21a.[1]

At the time of trial, two years later in July 1999, Mr. Nast was no longer employed by Petitioner and had been unable to secure employment. 22a. At that time, his employment choices were limited to unskilled jobs that did not require extended periods of sitting, standing, walking or lifting. *Id.* Dr. Gupta, Mr. Nast's treating physician, testified at trial that Mr. Nast would only be able to perform sedentary office work in which he could avoid bending, twisting and lifting. *Id.*

Prior to the accident, through a Subchapter S corporation in which he was sole shareholder, Mr. Nast had also conducted a seasonal fireworks business, which both sold fireworks and organized fireworks displays. 23a. Prior to the accident, Mr. Nast worked part-time in the business, loading trucks, lifting boxes, handling accounts and putting on actual displays. *Id.* After the accident, his activities in that business were substantially reduced and were limited to designing fireworks programs. *Id.*

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1. References herein to Petitioner's Brief in Support of Petition for Writ of Certiorari are denoted as "Pet.__" and references to Petitioner's Appendix are denoted as "_a." References to the Reproduced Record in the Superior Court of Pennsylvania are denoted as "R.R." followed by the page of the Reproduced Record.

A. Proceedings in the Court of Common Pleas of Philadelphia County.

Mr. Nast filed suit against Petitioner under the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.* ("FELA") in the Court of Common Pleas of Philadelphia County, Pennsylvania on June 25, 1998.

1. The Case Management Order – Discovery Cut-Off.

The Trial Court entered a Scheduling Order, dated September 28, 1998, which required that all discovery be completed on or before March 1, 1999. 14a. The Scheduling Order also required Petitioner to identify exhibits that it intended to submit into evidence prior to the pre-trial conference on June 24, 1999. *Id.*

2. The Trial Court's Ruling on Production of the Subchapter S Corporation Tax Returns and Ruling on Inadmissibility of the Tax Returns.

After the March 1, 1999 discovery cut-off, and only a few days before the start of the trial on July 12, 1999, Petitioner sought, by way of a Notice to Attend, additional records relating to Mr. Nast's fireworks business, specifically its 1998 Subchapter S tax returns and business records for 1999 (the "Tax Returns"). 26a. Mr. Nast objected to the request, and the Trial Court, on July 9, 1999, ruled that Mr. Nast was not required to produce the records. On the next business day, July 12, 1999, the Trial Court's decision denying production of the Tax Returns was placed on the record. The Trial Court memorialized its ruling excluding the Tax Returns and carefully premised its ruling on the condition "that there is no testimony introduced by plaintiff that there's a loss of business income in the second business; that the claim is the [sic] testimony reflect only plaintiff's perception of his ability to work and you've already said it's been stipulated . . . acknowledged that he can do sedentary work." (R.R. at 23a-24a).

In subsequently denying Petitioner's post-trial motion, and in response to Petitioner's contention that the documents should have been produced, the Trial Court amplified the reasons supporting its rulings on the production and admissibility of the Tax Returns by pointing to Petitioner's Scheduling Order violation:

> This assertion [regarding non-production and exclusion of the Tax Returns] ignores the fact that Defendant [Petitioner] did not request the information until trial itself, clearly outside the time limit for discovery set by the Scheduling Order issued on September 28, 1998 which required discovery to be completed on or before March 1, 1999. Moreover, the Scheduling Order required Defendant [Petitioner] to identify the exhibits that it intended to submit into evidence prior to the pre-trial conference held on June 24, 1999. 14a.

The Trial Court additionally observed that Petitioner had been permitted to cross-examine on Mr. Nast's fireworks business and held, alternatively, that any error in the evidentiary ruling excluding the Tax Returns was, in any event, harmless: "Additionally, Defendant [Petitioner] was allowed to question Plaintiff as to the content of the record in question and *thus, suffered no prejudice as a result of the Court's decision.*" 14a (emphasis added).

3. The Expert Economics and Vocational Testimony.

Both parties produced vocational and economics experts. The vocational experts, Rosaline Sampson for Mr. Nast and Philip Spergel, M.D. for Petitioner, testified that Mr. Nast was capable of some kind of future employment. However, both acknowledged that he could not return to employment with Petitioner. Using this information, the parties' expert economists, Andrew Verzilli, Ph.D., for Mr. Nast, and Brian Sullivan, Ph.D., for Petitioner, rendered opinions on Mr. Nast's future economic losses.

Although their calculations of Mr. Nast's actual losses differed, both sides' experts assumed that Mr. Nast's future losses would be mitigated by his securing some form of future employment consistent with his physical condition. The Trial Court did not prohibit these experts from testifying with respect to the relationship, if any, between Mr. Nast's attempts to secure future employment and his fireworks business. In addition, Mr. Nast's personal tax returns for 1998, which reflected Mr. Nast's income from the fireworks business, were produced. Petitioner was not prohibited from cross-examining Mr. Nast with respect to the fireworks business (R.R. at 136a).

4. The Trial Court's Jury Charge on Mitigation of Damages.

Contrary to Petitioner's suggestion that mitigation was not an issue in the case, the Trial Court specifically charged the jury on Mr. Nast's duty to mitigate in this FELA case: "*I also instruct you that an injured party is under a legal obligation to mitigate damages that is to minimize economic loss resulting in his injury by resuming gainful employment as soon as that can be reasonably done.*" (R.R. at 513a (emphasis added)). The jury returned a $3 million verdict in Mr. Nast's favor.

5. The Ruling on the Motions for Post-Trial Relief.

Petitioner filed post-trial motions arguing, among other things, that the "Trial Court committed an error of law or abuse of discretion in not requiring plaintiff to produce the 1998 business records of his solely owned business, Interstate Fireworks, Inc., per defendant's Notice to Attend" and in "*refusing to allow the use of any of plaintiff's business records or income from said business during the trial*" and seeking remittitur (emphasis added).

The Trial Court granted remittitur, reducing the jury verdict to $500,000, but denied all other post-trial relief.

B. Proceedings in the Pennsylvania Superior Court.

On Respondent's appeal of the remittitur and Petitioner's cross-appeal, a Panel of the Pennsylvania Superior Court, Pennsylvania's intermediate appellate court, affirmed the Trial Court's evidentiary ruling excluding the Tax Returns, but reversed the Trial Court's remittitur, and reinstated the jury's verdict. The Pennsylvania Superior Court Panel reviewed the evidence concerning Mr. Nast's ability to secure future employment. 36a-37a. In summarizing the vocational testimony, the Panel noted the record evidence that any job that Mr. Nast would find near his hometown would probably pay only the minimum wage and at no time questioned the Trial Court's ruling in permitting the jury to consider these alternative jobs or in permitting the jury to consider Mr. Nast's attempts to mitigate.

The Superior Court Panel acknowledged, but rejected, Petitioner's contention that the Tax Returns were relevant to Mr. Nast's future earning capacity and mitigation of damages. 26a. After noting that the Trial Court's rulings on the admissibility of evidence are not to be disturbed absent trial court abuse of discretion or error of law, the Panel stated that (i) the income from Mr. Nast's seasonal side business was not "relevant to the losses he sustained as a result of his inability to continue his employment as a machinist with railroad (27a)," and (ii) the evidence relating to that seasonal side business was "collateral to the issue of . . . [Nast's] damages resulting from the accident." 28a. The Superior Court Panel held that Mr. Nast's side business was "an independent source of income before, during and after the accident, and had no relationship to the losses he sustained as a result of the accident." 29a.

In its opinion, the Panel incidentally commented that "mitigation" is normally required only in cases involving a breach of contract and found no requirement of mitigation "in a negligence case." The Panel's remark included no specific mention of the FELA. Whether the Panel may have relied on its interpretation of state negligence law as a

surrogate reading of the FELA is unclear and ambiguous at best, and whether the appellate Panel may further have relied on that understanding as an alternative basis of its holding concerning the irrelevance of the Interstate Fireworks Tax Returns, as Petitioner suggests, is conjectural.

Petitioner's application for Superior Court *en banc* reargument was denied.

C. The Evidentiary Question Presented in the Petition for Allowance of Appeal in the Supreme Court of Pennsylvania.

In its Petition for Allowance of Appeal filed thereafter in the Supreme Court of Pennsylvania, Petitioner framed the question for review as one involving *the admissibility of evidence*, i.e., the Tax Returns. "In a case brought under the Federal Employers' Liability Act where plaintiff is alleging a diminution in earning capacity, should defendant be permitted to introduce evidence concerning plaintiff's alternate sources of income?" (Petitioner's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, at 5).

The Supreme Court of Pennsylvania denied discretionary review with respect to this question of admissibility of evidence.

SUMMARY OF ARGUMENT

This case, involving a state trial court evidentiary ruling on the admissibility of a particular item of evidence in an FELA action, does not warrant plenary review by this Court.

1. This Court lacks jurisdiction to review the judgment below. Both the state Trial Court and the Pennsylvania intermediate appellate court decided the case on the independent and adequate state law ground that certain tax returns Petitioner proffered were irrelevant and collateral to the issues, and therefore inadmissible under state evidentiary rules.

2. The question on the basis of which Petitioner seeks to induce review by this Court, whether a plaintiff in an FELA case has an obligation to mitigate his damages, was neither properly raised and preserved nor decided by the state courts below. In fact, an FELA plaintiff's duty to mitigate was endorsed and presented to the jury in this case by the Trial Court, which admitted other evidence on this issue and specifically charged the jury on that duty. The gist of the Trial Court's and Superior Court Panel's decision in this case involved not whether mitigation was required but what constitutes "mitigation," what is cognizable evidence of mitigation in the context of specific, limited damage contentions by the Plaintiff, and whether, in that context, the specific Tax Returns for Respondent's ancillary business were relevant and admissible in this case.

3. Since the issue of the existence *vel non* of a duty to mitigate is not properly before the Court, there is no "conflict" between the judgment below and the uniform decisions on that point by the federal circuit courts that warrants review.

4. The "conflict," if there were one — a conflict between an isolated panel decision of a single intermediate state appellate court and several unanimous federal circuit courts — is not sufficiently extensive or developed to warrant review by this Court. Petitioner points to not one other conflicting state court decision, and the cited federal circuit court decisions are in complete harmony.

5. The question of relevance and admissibility of tax returns of an ancillary business conducted by an FELA plaintiff is not sufficiently important to justify this Court's plenary review.

6. The judgment below is correct.

ARGUMENT

PETITIONER PRESENTS NO ISSUES THAT ARE WORTHY OF CONSIDERATION UPON A WRIT OF CERTIORARI

A. This Court Does Not Have Jurisdiction to Hear This Case Since It Was Decided on Independent and Adequate State Law Grounds.

This Court does not review a judgment of a state court when there exists an independent and adequate state law ground to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931). Where the state law ground is "independent of the federal question and adequate to support the judgment," *Coleman*, 501 U.S. at 729, any opinion of this Court on the federal question would be purely advisory. *See Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945). In this case, a state law ground existed for excluding the Tax Returns from the fireworks business (1) independent of the federal question, and (2) adequate to support the judgment.

1. The State Court Judgment Was Based on State Law Evidentiary and Procedural Grounds Independent of Any Federal Question.

The Trial Court in this FELA case specifically charged the jury that it was Mr. Nast's duty to mitigate damages. The issue presented to the state courts was whether the Tax Returns were admissible in evidence as relevant to the extent of this duty in such cases. Petitioner does not appear to dispute that the admissibility of evidence in an FELA case is governed by the law of the forum. *See Harding v. Consolidated Rail Corporation*, 620 A.2d 1185, 1188 (Pa. Super. 1993); 16 Am. Jur. 2d Conflict of Laws §168 (1998); Restatement (Second) of Conflict of Laws §138 (1971). In this case, the applicable law to determine admissibility of evidence was that of Pennsylvania.

The state trial court, which charged the jury on Mr. Nast's duty to mitigate, initially concluded that Mr. Nast was not required to produce the Tax Returns as a result of Petitioner's failure to comply with discovery and pre-trial deadlines in seeking them, and ruled that the Tax Returns were irrelevant. The Trial Court nonetheless ruled that Petitioner would be permitted at trial to question Mr. Nast on the information contained in those records. 14a. When presented with the same question, the Pennsylvania Superior Court Panel affirmed the Trial Court's exclusion of the Tax Returns and remarked that "evidence regarding the financial condition of the fireworks business was collateral to the issue of appellant's damages resulting from accident, which precluded his future employment as a machinist." 28a. In affirming, the Superior Court Panel did not need to decide whether a plaintiff in an FELA action has a duty to mitigate damages, or under what circumstances such a duty arises, or who has the burden of proof on the issue. After thoroughly discussing the other reasons why the Tax Returns were irrelevant and inadmissible in this case, the Panel, in response to Petitioner's argument that the Tax Returns went to mitigation of damages, incidentally remarked it was "aware of no requirement that a plaintiff in a negligence case mitigate his damages." 29a. The Panel, however, went on to emphasize that even if there were a requirement, the Tax Returns were still properly excluded on relevance grounds:

> To the extent railroad [Petitioner] is claiming the records related to employee's [Nast's] continuing ability to earn income from his fireworks business, which would offset his loss of income as a machinist, we have already address [sic] that issue. Employee's [Nast's] seasonal fireworks business was an independent source of income before, during, and after the accident, and had no relationship to the losses he sustained as a result of the accident, the only issue properly before the jury. Additionally, the fact employee [Nast] could continue his self-employment

because he could rest and move around as needed and could limit himself to sedentary jobs had no bearing on his ability to earn income in the open labor market. 29a.

2. The State Law Grounds Were Adequate.

The state law grounds were also adequate. In this case, the judgment rests on three distinct and adequate grounds: 1) the Tax Returns were irrelevant to any of the issues properly before the jury; 2) Petitioner failed to comply with discovery and pre-trial orders; and 3) Petitioner was permitted to question Mr. Nast on the Tax Returns and therefore suffered no prejudice by its failure to have them produced or introduced into evidence. 14a, 26a-29a. The Trial Court determination that the Tax Returns were irrelevant and thus inadmissible was within its discretion and, under Pennsylvania law, may not be disturbed absent a finding of abuse.

Since the state court exclusion of the Tax Returns rested on independent and adequate state law grounds, this Court lacks jurisdiction, and the Petition should be denied.

B. This Court Has No Jurisdiction Since Petitioner Failed to Raise a Substantial Federal Question in the State Court Proceedings and the State Courts Failed to Address a Substantial Federal Question.

The Petition raises no substantial federal question. *See McGoldrick v. Compagnie Generale*, 309 U.S. 430, 435-436 (1940). 28 U.S.C. §1257 requires that the federal statute at issue must have been "drawn in question." 28 U.S.C. §1257(a).[2] The "drawn in question" requirement is met when the statute is "drawn in question in a manner directly

2. The "drawn in question" requirement was applied to petitions for certiorari in the most recent revision of 28 U.S.C. § 1257. Prior to the revision, the requirement was that a question presented for review be "specifically set up or claimed." These phrases have been interpreted as substantially identical.

bearing on the merits of the action." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975); *see also Moore v. Illinois*, 408 U.S. 786, 799 (1972) (declining to review due process claim not argued in state court). Among the purposes of this requirement are to ensure an adequate record for review in this Court, to define the relationship between this Court and the state courts and to provide the state court an opportunity to base its decision on independent and adequate state law grounds. *See Illinois v. Gates*, 462 U.S. 213, 217-224 (1983).

The FELA was never "drawn in question" either by Petitioner or by the state court determinations below. Neither the Trial Court nor the Superior Court Panel were ever squarely presented with the question presented by the Petition to this Court whether a plaintiff under FELA has a duty to mitigate damages. The trial proceeded below on the proposition that there existed such a duty. The Trial Court allowed some questioning of Mr. Nast concerning his ancillary business and specifically charged the jury that Mr. Nast had a duty to mitigate. Both parties' experts testified on Mr. Nast's future employability. The questions presented to the state Trial Court and intermediate appellate court instead concerned whether court-imposed deadlines and state evidence rules precluded the production and admissibility of tax returns related to Mr. Nast's side business.

Petitioner is mistaken in its assertion that the Superior Court Panel squarely addressed the issue whether a plaintiff in an FELA action has a duty to mitigate. 29a. The only possible mention of that issue occurs in an isolated remark by the Panel in its discussion of the Trial Court's evidentiary ruling. There, the Panel merely commented that it was "aware of no requirement that a plaintiff in a negligence case mitigate his damages." 29a. To the extent this reference constituted a holding at all, it is clearly an alternative holding, at best. In this case, evidence was admitted and testimony heard on the mitigation issue, and

the jury was charged on the mitigation issue. Consistent with that background and understanding, when it unsuccessfully sought review in the Supreme Court of Pennsylvania, Petitioner itself framed the question for review as a question of admissibility of evidence: "In a case brought under the Federal Employers' Liability Act where plaintiff is alleging a diminution in earning capacity, *should defendant be permitted to introduce evidence concerning plaintiff's alternate sources of income?*" (Petitioner's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, at 5 (emphasis added)).

The question presented to the Supreme Court of Pennsylvania is not the issue presented in the Petition in this Court, but rather a question involving merely the *application* of the duty to mitigate to specific damage contentions and related evidentiary issues.

Since the specific question raised in the Petition in this Court was never presented for decision to any of the state courts and was not specifically addressed by the Pennsylvania Superior Court Panel, it was never "drawn in question."

C. The Question Presented Was Waived by Petitioner's Failure to Raise It in the Pennsylvania Supreme Court.

The question Petitioner presented in the Supreme Court of Pennsylvania in its unsuccessful Petition for Allowance of Appeal was solely an issue of admissibility of evidence: "In a case brought under the Federal Employers' Liability Act where plaintiff is alleging a diminution in earning capacity, should defendant be permitted to introduce evidence concerning plaintiff's alternate sources of income?" (Petitioner's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania at 5). The markedly different Question Presented in the Petition is: "Does a plaintiff in a Federal Employers' Liability Act (45 U.S.C. §51 *et seq.*) case have an obligation to mitigate his damages?"

Not only is the latter question not involved in this case, Petitioner failed to adequately preserve it and thereby waived it.[3]

D. The Judgment Below Is Correct.

This case proceeded in the state courts on the understanding that Mr. Nast had a duty to mitigate his damages under the FELA. Both Mr. Nast's and Petitioner's experts testified concerning Mr. Nast's ability to mitigate his damages by obtaining other employment. The jury was specifically charged on Mr. Nast's duty to mitigate. Petitioner does not challenge the adequacy of the jury charge.

Instead, Petitioner challenged the Trial Court's decision to exclude the use of the Tax Returns of Mr. Nast's fireworks business. Applying state law rules of evidence and citing *Ratti v. Wheeling Pittsburgh Steel Corp.*, 758 A.2d 695, 707 (Pa. Super. 2000) *appeal denied*, 785 A.2d 90 (2001), the Superior Court reviewed the Trial Court's decision on the admissibility of evidence for abuse of discretion or error of law and found none warranting reversal. 26a. The court noted that in order to be admissible, evidence must be competent and relevant. *See Sprague v. Walter*, 656 A.2d 890, 918 (Pa. Super. 1995), *appeal denied*, 670 A.2d 142 (1996). The Panel held that the information was irrelevant and that "evidence regarding the financial condition of the fireworks business was collateral to the issue of appellant's damages resulting from the accident, which precluded his future employment as a machinist." 28a. The Superior Court Panel also noted that Mr. Nast's fireworks business was "an independent source of income

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3. Moreover, with respect to the issue of admissibility of "evidence concerning plaintiff's alternate sources of income," framed in the Petition for Allowance of Appeal in the Pennsylvania Supreme Court, (i) Petitioner does not even attempt to contend there is any "conflict" warranting review, and (ii) the issue involves only a routine application of the settled principle that mitigation is required.

before, during, and after the accident and had no relationship to the losses he sustained as a result of the accident, the only issue properly before the jury." 29a.

It is also not disputed that Petitioner did not submit any evidence to indicate that as a result of the accident, Mr. Nast could spend more time on the fireworks business and that this increased time had resulted, or would likely result, in increased income to him, or even increased revenue and profits for the side business. To the contrary, Mr. Nast testified, without contradiction, that he no longer could perform many of the functions for the business that he performed pre-accident and was limited now to designing fireworks displays. Despite these undisputed limitations, Mr. Nast did not claim that his fireworks business was damaged as a result of his accident. Upon concluding that the Tax Returns were irrelevant, the state court correctly ruled that the Tax Records were inadmissible. *See* Pa. R.E. 402; *see also Monschein v. Phifer*, 771 A.2d 18, 22 (Pa. Super. 2001).

In this case, the Superior Court Panel correctly affirmed the ruling that the Tax Returns were inadmissible since they were irrelevant to the issues properly before the jury. 29a. The decision to exclude the Tax Returns was not an abuse of discretion, was fully consistent with state law authority, did not involve the Question Presented and does not warrant review by this Court.

Petitioner does not appear to squarely challenge this conclusion in this Court but seeks instead to induce review on a different issue that was never in serious dispute below. The gist of the Trial Court's and Superior Court Panel's decision in this case involved not whether mitigation was required, but what constitutes "mitigation," what is cognizable evidence of mitigation and, in view of plaintiff's particular damage contentions, which were limited, whether the specific Tax Returns involved in this case were relevant and admissible.

E. There Is No Conflict Warranting Review by This Court.

Petitioner's principal contention is that review is warranted because this case involves a "conflict" between a decision by the Supreme Court of Pennsylvania and the federal circuit courts. Pet. at 9. As noted, the Pennsylvania Supreme Court declined to hear the case.[4] What is presented to this Court, at best, is simply an alleged "conflict" between an isolated decision of one state intermediate appellate court panel and the federal circuit courts. Petitioner points to no other conflicting state court decision on this issue, and, as Petitioner correctly asserts, every other federal circuit court to have addressed the issue has reached the same conclusion.

Four of the federal circuit court decisions Petitioner cites relate to the adequacy of jury charges on the duty to mitigate (*Fashauer, Jones, Russell* and *Schneider*). One (*Wilson*) relates to refusal to charge where there was no record evidence that appropriate jobs were available to the plaintiff, and one (*Bissett*) involves a failure to object to the form of the charge. None of them is even related to, much less in conflict with, the decision below in this case.

In *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269 (3d Cir. 1995), the Third Circuit addressed plaintiff Fashauer's contention that the jury charge was flawed since the jury was not instructed that New Jersey Transit had the burden of proving that Fashauer failed to mitigate his damages. The district court instructed the jury that "[p]laintiff must try to minimize the damages due to loss of wages. But extraordinary or

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4. The jurisdiction of the Pennsylvania Supreme Court in this case is discretionary and is exercised only for "special and important reasons." Pa. R. App. P. 1114. As in the case of denials of petitions for writ of certiorari by this Court, the Pennsylvania Supreme Court's decision not to allow an appeal in this case cannot be equated with its adoption of the Pennsylvania Superior Court Panel's reasoning, decision or judgment as Petitioner incorrectly suggests. Pet. 9-10.

impractical efforts are not necessary. All that is required are reasonable efforts and ordinary care in trying to reduce the loss." *Id.* at 1288. In reviewing the adequacy of the charge, the Third Circuit noted that the district court did not explicitly tell the jury that Fashauer had a duty to mitigate and did tell the jury how to reduce damages if it concluded that he failed to mitigate. Nevertheless, the Third Circuit rejected Fashauer's argument that he was prejudiced by the jury charge, concluding, among other things, that defendant has the burden to prove failure to mitigate with regard to past loss of earnings, not future losses. In this case, neither Mr. Nast nor Petitioner challenges the jury charge on mitigation. Petitioner questions only the exclusion of certain evidence that it believed relevant to Mr. Nast's duty to mitigate. That issue was not addressed by the *Fashauer* court.

The *Fashauer* court relied upon the Sixth Circuit's decision in *Jones v. Consolidated Rail Corp.*, 800 F.2d 590, 593 (6th Cir. 1986), for the general and undisputed statement that under FELA a plaintiff has a duty to mitigate his damages. The Sixth Circuit in *Jones* addressed the adequacy of the jury charge on mitigation, holding that "the charge [on loss of past earnings] did not adequately inform the jury that the plaintiff was entitled to the difference between what he would have earned on the railroad and what he might have earned in another position." *Id.* at 594. *Jones* is inapposite here, where Petitioner does not even challenge the jury charge. The Seventh Circuit in *Russell v. National Railroad Passenger Corporation*, 189 F.3d 590, 596 (7th Cir. 1999), also reviewed the adequacy of a jury charge on mitigation, holding that the jury charge was both properly given to the jury and adequate.

The remaining cases cited by Petitioner likewise are not only not inconsistent with the decision below, but support the exclusion of certain evidence of other possible employment when it is irrelevant to mitigation. In *Schneider v.*

National Railroad Passenger Corporation, 987 F.2d 132 (2d Cir. 1993), the jury was charged on mitigation. The Second Circuit held that district court did not err by preventing defendant in its summation from arguing that plaintiff failed to mitigate her damages by accepting an alternative job offered by defendant. *Id.* at 136. On a record that parallels that in this case, the court noted defendant failed to satisfy its burden of showing *that plaintiff could have mitigated her damages*. The court concluded that the burden was not met since there was evidence that plaintiff was not capable of full-time employment. *Id.* The *Schneider* court's decision is in complete accord with the decision in this case. In both cases, the jury was properly charged on mitigation, and the appellate court agreed that certain evidence was not relevant to mitigation and therefore inadmissible. In *Schneider*, it was plaintiff's failure to accept a job offer. In this case, it was Mr. Nast's income from his seasonal side business that he operated before and after the accident.

In *Wilson v. Union Pacific Railroad Company*, 56 F.3d 1226 (10th Cir. 1995), the trial court expressly refused to instruct the jury on mitigation since there was no evidence in the record that appropriate jobs were available to plaintiff. *Id.* at 1232. The Tenth Circuit held that it was within the trial court's discretion to conclude that there was insufficient evidence to justify a jury charge on mitigation. *Id.* The decision in *Wilson* further supports the discretion of the Trial Court to exclude evidence when it is immaterial and/or irrelevant to mitigation.

Petitioner also cites *Bissett v. Burlington Northern Railroad Company*, 969 F.2d 727 (8th Cir. 1992), in which, contrary to Petitioner's mistaken contention, the *Bissett* court concluded that information relevant to mitigation was properly admitted and that plaintiff had waived his challenge to a mitigation instruction. *Id.* at 730-731.

In contrast with these decisions, the adequacy of the trial court's jury charge on mitigation is not an issue in this

case. Here, the jury was charged on mitigation — a fact that Petitioner curiously omits to mention in the Petition. There is no issue as to the adequacy of that charge. The cases Petitioner cites do not support a conflict between the federal circuit courts and the Pennsylvania court below. Moreover, Petitioner points to no other conflict between the federal circuit courts and any other state appellate court.

F. The Question Is Not Sufficiently Important to Warrant This Court's Review.

Petitioner offers no compelling reason to grant the Petition. The actual question involves an evidentiary decision by a state intermediate appellate court regarding admissibility of particular evidence, which is governed by state law, and subject to trial court discretion. The Superior Court Panel's casual, almost offhand, remark with respect to mitigation, whether accurate or not, was not necessary to its decision and did not specifically address any issue of interpretation of the FELA. Petitioner cites not one other allegedly conflicting Pennsylvania appellate decision relating to the issue of mitigation in FELA cases.

The Supreme Court of Pennsylvania did not consider the issue sufficiently important to grant review, and the question does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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